Trustees for ALASKA

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Attention: Rules Processing Team (Comments)
Department of the Interior
Minerals Management Service
Mail Stop 4024
381 Elden Street
Herndon, VA 20170-4817

Via Fax (703)787-1093 and U.S. Mail

RE: Post Lease Operations Safety, Proposed Rule
30 C.F.R. Parts 218, 250, and 256; 63 F.R. 7335-7356

Dear Minerals Management Service:

The Alaska Wilderness League, Greenpeace, National OCS Coalition, Northern Alaska Environmental Center, Sierra Club, The Wilderness Society, and Trustees for Alaska hereby submit coroments on the MMS proposed rules on Outer Continental Shelf (OCS) post lease operations that were published in the Federal Register on February 13, 1998 (63 F.R. 7335-7356), corrected on March 9, 1998 (63 F.R. 11385), and given a comment period extension on May 7, 1998 (63 F.R. 25187). These proposed rules provide the authority to MMS to grant an easement and a right-of-use on the OCS to a state lessee and completely revise 30 C.F.R. part 250, subpart A, the general OCS lease operations provisions.

We are concerned about the environmental consequences of the proposed regulatory changes on the marine and coastal environments and adjacent public lands. In Alaska in particular, this includes the Arctic National Wildlife Refuge, National Petroleum Reserve - Alaska, and other parks and refuges, as well as sensitive marine and coastal areas. Our concerns are in three major areas:

- Because of the new language on right-of-use and easements, the proposed regulations may further reduce the environmental standards and opportunities for public involvement in controversial oil drilling projects, such as ARCO's Warthog well which was drilled from federal OCS leases into state leases off the coast of the Arctic National Wildlife Refuge. In addition, the proposed new language on right of use and easements appears to arbitrarily broaden the rights of lessees without justifying the need for such a change by indicating where and or what purpose the regulations are being modified.

- Procedures are lacking for notifying or involving the public in key approvals, such as right-of-use and easements and others that could have environmental impacts.

- Under the rubric of using "plain language," the environmental standards appear to have been weakened, and the inadequate existing procedures for public involvement appear to have been further weakened.

While we generally support the MMS "plain language" goal, it has been extremely difficult to track the proposed changes and determine their effect. For the "plain language" changes, MMS should make clear in its final rule-making that they are not intended to make substantive changes in the intent of the existing regulations, or explain otherwise if that is not so.

In the comments that follow, we refer to the sections in the proposed rule changes and compare these to the existing regulations as renumbered by the MMS notice of May 29, 1998 at 63 F.R. 29477-29488.

Right-of-use and easement. We are extremely concerned about the proposed major expansion of the MMS authority to issue rights-of-use and easements in the OCS as proposed in § 250.18 entitled "When will MMS grant a right-of-use and easement?" We are especially concerned about proposed § 250.18(c), which allows "granting a right-of-use and easement to adjacent state lessees."

The proposed rule fails to provide sufficient rationale for the need to expand MMS authority to issue rights-of-use and easements in the OCS to accommodate state lessees. Under what statutory authority is this expansion of the regulation authorized?

Moreover, what type of specific uses is this expansion intended to cover? Does it cover gravel mining, placement of gravel islands, disposal of dredge spoils, oil and natural gas pipeline construction and operation, processing platforms, seawater treatment plants, underground injection well sites, placement of exploratory drill ships or concrete island drilling structures? The failure to better define "right of use" in the regulations may be the nub of this problem.

While MMS indicates the expansion is being proposed "in an effort to establish and maintain a cooperative relationship with coastal states, and lessees of State submerged land oil and gas leases adjacent to the OCS," (see "Granting a right-of-use and easement", 63 F.R. p.7335), the proposal does not specifically identify the geographic situations when this accommodation might be necessary. Thus, it is very difficult to evaluate the potential effects of the regulatory change. The proposed change seems designed to allow more activity in OCS waters than could be granted under the existing regulations.

Moreover, it appears that MMS would not have to go through the public lease sale process in order to allow temporary or permanent activities, such as exploration or production platforms, pipelines, or gravel extraction for gravel drilling islands. This is of major concern to us in areas where MMS has already declined to go ahead with leasing. The good example is in the Arctic National Wildlife Refuge OCS area, where MMS OCS Lease Sale 170 will not offer

new leases but where the State of Alaska is proposing another lease sale directly offshore the refuge. Is this one of the areas where MMS might exercise its proposed expanded regulatory authority?

We do not believe MMS has the legal authority to allow the placement of exploratory or production drill rigs or authorize other related uses in areas where OCS leasing has not been authorized, or where there are no active leases. As written, the proposed regulatory change might arguably allow exploration and related activities even in areas currently covered by OCS leasing moratoria, contrary to the expressed intent of Congress and recent Presidential actions.

It also is not clear from the proposal whether a state lessee would have to comply with all other MMS regulations, as if the state-lessee applicant for a right of use or easement were a federal lessee. Is it the intention of the proposed § 250.18(c)(2) that state-lessee applicants comply with all other MMS regulations otherwise applicable to federal lessees? This should be made clear.

In the context of authorizations to state lessees, the provision allowing "continuation of the right beyond lease termination" [proposed § 250.18(b) and also in existing regulations at § 250.107(f)], could be problematical in the event that state leases do not necessarily track the language of federal leases. Moreover, state lease terms may be inconsistent with federal plans for the OCS.

While it is important for MMS to collect fees and rentals for use of OCS lands, it is unclear in the proposed regulations whether the fee arrangements referred to would be adequate in light of the costs to be incurred by MMS for monitoring, enforcement, and other regulatory oversight.

If MMS grants rights-of-use and easements for OCS lands to state lessees, environmental standards and public involvement requirements need to be strengthened. In fact, these should be higher than usual since a major stage of environmental impact analysis and opportunity for adding lease stipulations in the leasing and development process would have been left out. The proposed § 250.18 (a), and the definitions "right-of-use means any authorization to use OCS lands issued under this part", and "easement means an authorization for a non-possessory, non-exclusive interest in a portion of an OCS tract, whether leased or unleased, which specifies the rights of the holder to use the area embraced in the easement in a manner consistent with the terms of the granting authority," (proposed § 250.2) are open-ended regarding the types of activities and infrastructure that could be allowed. The proposed regulations fail to provide any criteria by which the applications would be evaluated to determine if the environmental impact is acceptable or if the use would otherwise be in the national interest. While proposed § 250.18 states "MMS may grant you a right-of-use and easement on the OCS if you meet these requirements..." it fails to describe the necessary consideration of environmental standards as is required by the OCS Lands Act Amendments (OCSLAA). See, e.g., 43 U.S.C. 1802 ("to balance orderly energy resource development with protection of the human, marine, and coastal environments").

In light of the fact that development of state submerged lands will not add federal royalties, even greater consideration of the environmental costs is warranted. The regulations should reflect that a right of use or easement will not be granted unless it is consistent with the goals of the OCSLAA to protect the human, marine, and coastal environments and to eliminate or minimizes risk of damage to the human, marine, and coastal environments.

In addition, there should also be an express requirement that the proposed exploration or development activities and facilities comply with the state's approved coastal zone management plan. Express requirements for notification to the state regarding applications with a public comment period are also needed. It is important that federal authorizations are not finalized ahead of a state's review.

The proposed § 250.18 is therefore not in the public interest because it fails to include any requirements for public notification, nor provide a public comment period or evaluation criteria for environmental and other public interest considerations to be evaluated. We recommend that public notices of applications for rights-of-use and easements be required with at least a 60-day public comment period. It is crucial that rights-of-use or easements not be granted until all other MMS regulatory requirements have been met and that the environmental impact analysis required under the National Environmental Policy Act (NEPA) is complete. Otherwise, a piecemeal review could take place with what may be the most controversial approval stage having passed without any requirement for public notification.

Definitions. In the attempt at "plain language" some of the existing regulatory definitions appear to have been weakened.

Lease. "Lease means any form of authorization which is issued under section 8 or maintained under section 6 of the Act..." This definition is more inclusive than the proposed definition.

Exploration. We agree with the change from "searching for minerals" to "search for oil, gas, and sulphur." However, we believe that all exploration, not just the "commercial search" should be addressed by the regulations. We agree with the change that geophysical and geological surveys should list the additional types of surveys (seismic reflection and refraction, gas sniffers, coring). We disagree with the change that considers more than one delineation well to be exploration, and urge MMS to use the existing language, "any drilling, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery that is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and production." The public comment and involvement requirements are less for exploratory well plans. It is in the public interest to have greater involvement in the decision-making process prior to the company making the final decision that it intends to develop a field.

Maximum efficient rate. In the NPRM, there is no explanation why this definition is proposed for deletion.

Conservation. MMS proposes a new definition: "conservation means preservation, economy, and avoidance of waste. It is especially important in the petroleum industry, since oil and gas are irreplaceable."

The concept of "conservation" is central to the overarching responsibility for implementing OCSLAA to "preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf... to balance orderly energy development with protection of the human marine, and coastal environments". 43 U.S.C. § 1802(2).

On this point, we note that the existing regulations contain a§ which has been dropped in the proposed rule which helps to make clear this broader conservation responsibility: "The Director is authorized and directed to act upon the requests, applications, and notices submitted under the regulations in this part to issue either written or oral orders to govern lease and right-of-way operations and to require compliance with applicable laws, regulations, and lease terms so that all operations conform to sound conservation practice..." 30 C.F.R. §. 250.104.

In later subparts of the regulations, the definition of "conservation" also has important ramifications. See, for example, 30 C.F.R. § 250.1304 (a), "How will MMS require unitization." This section says, "If the Regional Supervisor determines that unitization of operations within a proposed unit area is necessary to prevent waste, conserve natural resources of the OCS, or protect correlative right, including Federal royalty interests, the Regional Supervisor may require unitization." We understand that "conserve natural resources of the OCS" pertains to more than the hydrocarbon resources, but also includes the wide range of natural resources, as they are defined in 43 U.S.C. § 1301.

Therefore, we suggest "conservation' be defined to make a direct reference to the statutory definition of "natural resources" in 43 U.S.C. § 1301, where natural resources "includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life."

Easement. Since we believe that easements should not be granted for OCS lands where there is no federal lease, the definition of easement should be narrowed accordingly.

Right-of-use. As noted previously, the definition is not sufficiently detailed to understand what "authorizations" might be encompassed.

Other proposed changes in the regulations that weaken environmental protection or public oversight. The existing regulations contain a section that makes it clear that implementation of the regulation of operations on the OCS remains "subject to the supervisory authority of the Secretary." 30 C.F.R. §. 250.104. This wording should be retained so that the Secretary's oversight role remains clear.

Other language that was deleted from the existing regulations should also be retained, as it provides some environmental standards for decision-making. For example, proposed for deletion is "The Director, in accordance with the regulations in this part, shall accomplish the

following: (a) Regulate all operations conducted under a lease, right-of-use and easement, or right-of-way to promote orderly exploration, development, and production of mineral resources and to prevent unreasonable harm or damage to, or waste of, any natural resources (including any mineral deposits in areas leased or unleased), any life (including fish and other aquatic life), property, or the marine, coastal, or human environment." 30 C.F.R. § 250.105(a). If anything, this provision should be strengthened, not eliminated.

In the proposed § 250.3, "Under what standards will the Director regulate . lease operations?", the suggested list of three items weakens the current regulatory standards given in §. 250.104, and § 250.105, and leaves out key criteria provided in OCSLAA, 43 U.S.C. § 1802. In fact, we believe that the standards should be stronger in order to truly reflect the Congressional intent for adequate environmental protection as provided in the OCSLAA purposes at 43 U.S.C. § 1802. At a minimum, the list should change item (a) to read as follows: "balance orderly energy resource development with protection of the human, marine, and coastal environments". These considerations should be added: "encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments," "minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish," and "assure that States, and through States, local governments, have timely access to information and regarding activities on the OCS, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities, and thereby assure adequate protection of the human environment."

Proposed § 250.4, "What measures must I take to protect health, safety, property, and the environment?", fails to provide any environmental standards, weakens the existing environmental standards in 30 C.F.R. § 250.104, and § 250.15, and elsewhere, and is inconsistent with the intent of OCSLAA.

Proposed § 250.8, "When must I use best available and safest technologies (BAST)?", enunciates weaker environmental standards than the existing regulations. The existing regulations also require BAST to be used whenever practicable on existing operations, as well as for new exploration, development and production operations.

Miscellaneous comments. We support the concept of MMS defining criteria for disqualifying operators with repeated poor operating performance from acquiring any new lease holdings. Proposed § 250.12. However, it is not clear what would happen if MMS revoked a company's designation as operator and it was the sole lessee.

We also support the requirement for written accident reports. In general, we believe that the criteria for what information should be made available to the public fail to adequately consider the public interest in having the best possible information on all natural resources in the OCS. We urge MMS to re-evaluate what data and information may be made available to the public.

Thank you for considering our comments.

Sincerely,

Michael J Frank
Staff Attorney